No. 9442

United States
Circuit Court of Appeals
For the Ninth Circuit

BARNARD-CURTISS COMPANY,
a corporation,

Appellant,

vs.

ERNEST MAEHL,

Appellee.

Brief of Appellee

Russell E. Smith
Kendrick Smith
J. J. McDonald
Attorneys for Appellee.

Upon Appeal from The District Court of The United States for The District of Montana.

Filed .....

.....Clerk

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GENERAL FAILURE OF DEFENDANT-APPELLANT TO COMPLY WITH RULES U. S. C. C. A., RULE 24, 2 (d).

Summary: Defendant-appellant's failure to set forth each specification or assignment of error preceding the argument addressed to it, as required by Rules U. S. C. C. A., Rule 24, 2(d), is sufficient to permit this Court to disgregard all questions sought to be raised.

Preliminary to any discussions of the points and questions sought to be presented by defendant-appellant, we wish to call the court's attention to the failure of the defendant to comply with the rules of this court. Defendant filed a "Statement of Points", incorporated in the Record, setting forth seven points. (R. 374). In its brief (pp. 2-4) defendant has set forth six "Questions Presented", amplifying the points somewhat but omitting therefrom points 1 and 7 as made in the "Statement of Points". After a statement of the case (Brief, pp. 5-13), defendant states: (Brief, p. 13)

> "Specifications of Errors To Be Urged."
>
> "The appellant will reply upon all points set forth in its statement of points (R. 374) excepting only point No. 1."

Thereafter defendant makes a preliminary argument and then takes up the "Questions Presented", six in number under four main subdivisions. (Brief, pp. 19, 25, 53, 60). Nowhere in the preliminary argument or in the four main subdivisions of argument is there any attempt to set forth the substance or the text of the specifications of error or the questions presented

preceding the argument addressed to it. The defendant has clearly violated the requirement of Rule 24, 2(d) of the Rules U. S. C. C. A., that appellant's brief contain:

> "A specification by number of such of the assigned errors as are to be relied upon, with reference to the pages of the record where the assignments appear. Thereafter each such assignment of error shall be printed in full preceding the argument addressed to it. Where the specified error is more than two printed pages in length, it may be summarized before the argument addressed to it, in which event the specified assignment must be printed in full in an appendix. The argument need not be arranged in the order of the number of the specified assignments."

This court has definitely announced that this rule must be strictly complied with.

> *Gripton v. Richardson,* (C.C.A. 9), 82 F. (2d) 313;
> *Gelberg v. Richardson,* (C.C.A. 9), 82 F. (2d) 314;
> *Berry v. Earling,* (C.C.A. 9), 82 F. (2d) 317;
> *Hultman v. Tevis,* (C.C.A. 9), 82 F. (2d) 940.

This court may disregard the entire specifications of error made by the defendant.

JOINDER OF METCALF AS A THIRD PARTY WAS PROPERLY DENIED (Defendant's first question).

Summary: Defendant's motion to join Metcalf was patently made under Rule 14(a), without any showing that Metcalf was or could be liable to defendant or plaintiff for any part of plaintiff's claim against de-

fendant. No showing is here made of abuse of discretion in denying the motion. Defendant was in no position to invoke protection under Rule 22(1). Therefore, the motion was properly denied. (R. 55)

Defendant has urged in its brief (pp. 19-25) that the motion was made under Rule 14(a) and Rule 22(1) of the Rules of Civil Procedure for the District Courts of the United States, adopted pursuant to the Act of June 19, 1934, C. 651 (48 Stat. 1064; 28 U. S. C. A. secs. 723 b, 723c), and effective September 1, 1939. (Rule 86). Defendant has made no effort to distinguish between the two Rules and proceeds upon the apparent presumption that they are alike in scope, character and coverage. Because the two Rules are so entirely diffrent as to procedure and coverage, we shall discuss them separately.

Rule 14(a) provides, so far as here pertinent:

> "Before the service of his answer a defendant may move ex parte or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action *who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him.* If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defenses as provided in Rule 12 and his counter-claims and cross-claims against the plaintiff, the third-party plaintiff, or any other party as proviled in Rule 13. The third-party defendant may assert any defenses which the third-party plaintiff has to the plaintiff's claim." (Italics supplied).

Defendant's answer was served on October 1, 1938 (R. 30). Thereafter on April 11, 1939, (R. 54) defendant filed its motion to join Metcalf as a third party. The motion prayed for an order, on five days' notice to plaintiff,

> "for leave to serve summons and complaint in this action upon C. A. Metcalf, an individual residing in Granite County, Montana, within the jurdisdiction of this Court, said C. A. Metcalf being a person *who is not a party to this action but who is or may be liable to this defendant or to the plaintiff for all or part of the claim of the plaintiff Ernest Maehl against this defendant,* or liable to this defendant on its counter-claim against the plaintiff Ernest Maehl." (Italics supplied). (R. 38-39)

We call the court's attention to the italicised portions of the rule and the motion. The similarity is at once apparent. Moreover the motion to secure leave of court was made after answer and after notice to plaintiff. The defendant patently based its motion upon the provisions of Rule 14(a).

Two reasons sustain the ruling of the district court in denying the motion. No showing was made that Metcalf

> "is or may be liable to him (defendant) or to the plaintiff for all or a part of the plaintiff's claim against him (defendant)." Rule 14(a).

The motion made no showing whatever that Metcalf was or could be liable to the plaintiff or to the defandant for any part of the plaintiff's claim against the defendant. Exhibit D (R. 42) and Exhibit E (R. 48) attached to the motion show that Metcalf had instituted two suits in the state courts against Barnard-Curtiss

Company. One action was on a contract, and alternatively in quantum meriut, for the clearing and grubbing of certain lands; the other was on a contract, or alternatively in quantum meriut, for the delivery of stulls. Two of the counts in plaintiff's complaint covered practically the same subject matter, but plaintiff Maehl alleged that the contracts were between him and the defendant. The question presented therefore was one where the defendant feared there might be a possible double or multiple liability against it. In fact the motion affirmatively demonstrated the inapplicability of the provisions of Rule 14(a). There was an entire absence of any attempt to show that Metcalf was or could be liable to Barnard-Curtiss Company or to Maehl for any part of Maehl's claim against Barnard-Curtiss Company. For this reason alone the court properly overruled the motion. The cases cited by defandant (Brief, pp. 23-24) on Rule 14 show precisely the ordinary case for third-party interpleader, i. e., where the defendant seeks to bring in an alleged joint tort feasor or a party alleged to be principally liable to plaintiff.

Defendant's position under Rule 14(a) is not improved by the assertion in its motion that Metcalf is "liable to this defendant on its counterclaim against the plaintiff Ernest Maehl." (R. 39) By defendant's answer, filed before the motion, a counterclaim was set up against Ernest Maehl alone for the breach of a written contract solely between himself and Barnard-Curtiss Company. (R. 26-28). The motion does not

show how or in what possible manner Metcalf could be liable to defendant on this counterclaim. Defendant glossed over the matter and the lower court properly ignored it.

For a second reason defendant may not rely upon Rule 14(a). Leave to bring in a third party under Rule 14(a) is not a matter of right, but rests in the discretion of the court.

> *Tullgren v. Jasper* (D. C. Md.), 27 F. Supp. 413, 418;
> *McPherrin v. Hartford Fire Insurance Co. v. Phoenix Insurance Co.,* (D. C. Omaha), 64 Dept. of Justice Bull. 35.

In *General Taxicab Association v. Henrietta C. O'Shea*, 109 F. (2d) 671 (C.C. A. D .C.) plaintiff sued for injuries arising from the alleged negligence of defendant in operating a "General Cab". Defendants moved the court to implead as third party defendants the owners and operators of a "Diamond Cab" in which plaintiff was riding and submitted a proposed third-party complaint charging the third-party defendants with negligence and asking that judgment, if any, be entered against them. Upon plaintiff's declining to amend, the motion was denied. After reviewing the source authorities and constructions of comparable rules, the court declared: (P. 673)

> "Against this background of statutes and decisions, the Supreme Court, in framing Rule 14 (a), chose the language 'a defendant may move . . . *for leave* as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action . . .,' and the language '*If* the motion is

granted . . .' (Italics supplied). We think there can be no doubt that it was thus intended to make the impleading of third parties in the Federal practice discretionary with the trial court. See 1 Moore, *op. cit. supra,* 741: 'Whether a party to an action shall be allowed to implead an additional party rests in the discretion of the court. This is in accord with the English, New York and Wisconsin practices.'

"With impleader a matter within the discretion of the trial court we could find error in the instant case only upon a theory that the overruling of the motion to implead third parties was an abuse of discretion. We find nothing in the present record indicative of an abuse—especially since neither the appellee, nor even the appellants themselves, asserted a cause of action against the proposed third-party defendants."

And here, neither the defendant Barnard-Curtiss Company or Ernest Maehl assert any cause of action against Metcalf. The defendant has not shown nor made any real effort to show an abuse of discretion.

Another matter which unquestionably influenced the court's discretion is this: The motion asserted that the Metcalf suits, then pending in the state court, covered some of the same matters involved in this case. Nowhere does the record suggest that any steps had been taken to enjoin the litigation in the state court, as was done in *Standard Surety & Casualty Co. of New York v. Baker,* (C.C.A. 8) 105 F. (2d) 578. And as a matter of fact no such steps were taken in the Federal Court. If under these circumstances the court had granted the motion, then the State Court and the Federal Court, so far as Metcalf is concerned, would have been exer-

cising concurrent jurisdiction over the same matter, with the resulting troublesome questions of jurisdiction. If the State Court had rendered a decision prior to the determination in the Federal Court, we would have the unusual spectacle of a Federal Court trying to determine to what extent it was bound by the decision of a State Court in a case in which both courts were exercising jurisdiction. Since the relief asked by appellant would not have stayed or in anywise interfered with the Metcalf suits pending in the State Court, the Federal Court here in its discretion was warranted in refusing to grant the motion.

Defendant now urges that its motion was also made under Rule 22 (1). Defendant makes the unwarranted assertion that Metcalf "was claiming the same fund." (Brief, p. 25) . No fund was shown to exist. At best the statement is an inadvertent one. It has been already noted that a motion was made, leave of court asked, notice given to plaintiff, and the motion grounded upon the assertion that Metcalf "is or may be liable to this defendant or to the plaintiff for all or part of the claim of the plaintiff Ernest Maehl against this defendant." In other words the motion was patently made and predicated upon the provisions not of Rule 22 (1) but of Rule 14 (a). Having proceeded under Rule 14 (a) the defendant is in no position to put the District Court in error by now invoking the protection of Rule 22 (1).

Indeed, it is a most strange anomaly for counsel for

defendant to urge alleged error of the District Court when it is so obvious that counsel are attempting to rectify their own oversight. The pertinent portions of Rule 22 (1) have been quoted by defendant, but because of an apparent printer's error the correct quotation is here given:

> "(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20."

A defendant, under this Rule, "who is or may be exposed to double or multiple liability," may obtain interpleader of the claimants *by way of cross-claim or counterclaim.* Defendant's answer was filed October 1, 1938 (R. 32) containing two counterclaims against the plaintiff Maehl *but no cross-claims against Metcalf.* On April 11, 1939, the motion for leave to make Metcalf a third party was filed. (R. 54) Meantime the suits of Metcalf against Barnard-Curtiss Company had been filed in the state district court. The two actions were filed about July 20, 1938, the date appearing up-

on each verification made before the clerk of the district court. (R. 48, 51.) Indeed, we believe that counsel for defendant will freely admit that defendant had knowledge of the Metcalf claims and suits long before the defendant filed its answer in this case.

After the filing of its answer October 1, 1938, and until the filing of its third-party motion, defendant made no effort to amend its pleadings to set up a cross-claim against Metcalf.

Under Rule 15 (a) such an amendment of the answer could have been made as a matter of course prior to April 3, 1939, when the plaintiff's reply was served. (R. 37)

> "(a) A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleadings only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Defendant made not effort to amend its answer in any way. Nor did the defendant at any time thereafter seek leave of court to amend its answer. The third-party motion, made as it was under Rule 14 (a), asked leave "to serve summons and complaint in this action" upon Metcalf. Not even the form of a proposed complaint was presented to the court as an exhibit or otherwise.

Clearly the defendant never in any way sought to

amend its answer to set up a cross-claim against Metcalf. Defendant has proceeded upon Rule 14 (a) and improperly asserts that error was committed as to, and under, Rule 22 (1). As well might defendant assert that the district court improperly and erroneously refused to permit an amendment to defendant's answer. Neither interpleader under Rule 22 (1) nor an amendment was ever sought and the court may not be put in error for denying what was never requested.

The cases, cited by defendant, construing Rule 22 (1) are not applicable. In *Standard Surety & Casualty Co. of New York v. Baker* (C. C. A. 8) 105 F. (2d) 578, the plaintiff by its complaint *joined* as defendants all claimants making multiple claims.

Defendant has sought to put the district court in error *nunc pro tunc* because it is asserted that the *evidence at the trial* showed Maehl and Metcalf were claiming under the same contract. (Brief, p. 19). Even were this assertion correct (we shall later show it incorrect), it was not made in the motion and the later alleged discovery of the point affords defendant no comfort.

DEFENDANT'S MOTION FOR A DIRECTED VERDICT ON PLAINTIFF'S CAUSES OF ACTION NUMBERED 1, 2, AND 6, WAS PROPERLY OVERRULED BY THE COURT. (Defendant's second, third and fourth questions.)

Summary: The evidence, which on a motion for directed verdict must be viewed in a light most favor-

able to plaintiff, shows: (a) as to first cause of action, that there was an oral contract between plaintiff alone and defendant for clearing the reservoir site and grubbing the dam site; (b) as to the second cause of action, that there was an oral contract between plaintiff alone and defendant for the grubbing of a "borrow pit", that there was no material variance between the pleading of an agreed price and the proof of a reasonable price, and that the work was performed without any payment therefor to plaintiff; and (c) as to the sixth cause of action, that there was proof of the reasonable value of plaintiff's services, rendered at defendant's request.

Preliminary to a discussion of the evidence relating to the three causes of action, we refer to an axiomatic rule. On motion for a directed verdict, the evidence must be considered most favorably to the opponent of the motion.

> *Whitney Co. v. Johnson,* (C.C.A. 9) 14 F. (2d) 24;
> *Port Angeles Western R. Co. v. Thomas,* (C.C.A. 9), 36 F. (2d) 210, 211;
> *Northwestern Pac. R. Co. v. Fiedler,* (C.C.A. 9), 52 F. (2d) 400, 402.
> *Brownlee v. Mutual Ben. Health & Acc. Ass'n.,* (C.C.A. 9) 29 F. (2d) 71, 76:
> "A motion for a directed verdict, like a motion for nonsuit, is in the nature of a demurrer to the evidence. In its determination the evidence upon the part of the plaintiff must be accepted as true, and every proper inference or deduction therefrom taken most strongly in favor of the plaintiff."

A. Defendant's chief contention, apparently is that

Maehl's first cause of action, for clearing 118 acres of a reservoir site, could not be sustained because, even if a contract were proven, it was a contract involving Maehl and Metcalf, jointly as one party, and that Maehl could not sue alone upon the contract.

On the review of the testimony defendant graciously restricts itself to the evidence offered by the plaintiff. (Brief, p. 26). The analysis thereupon made by defendant of this evidence does not give the true picture and a correct analysis shows the error of the conclusions reached by defendant.

1. *Preliminary negotiations.*

In 1935 the two Barnards, Metcalf and Maehl went to the site of the dam on the East Fork of Rock Creek. (R. 166-167). At that time it was the intention of Maehl to do the work together with Metcalf but all conversation about the job was between Ernest Maehl and Jim Barnard. (R. 167-168). The price asked at time was $100.00 per acre and Jim Barnard was advised he could put in his bid on the project accordingly. (R. 63-64). At that time the Barnard-Curtiss Company did not make the successful low bid on this Montana Water Conservation Board project. (R. 64). Nothing further was done until the summer of 1936.

2. *The oral contract of 1936:*

On June 23rd or 24, 1936, Maehl was visited again by Jim Barnard alone (R. 66). Maehl testified:

> "Q. Will you tell the Court and the jury what the second conversation that you had with Mr. Barnard was?

"A. Jim Barnard come to me and we was just getting ready to run concrete and he said I am going to make another bid on this dam and he wanted to know if I would stay with my agreements same as I made before and I told him I would and he says there is three acres of grubbing which was not listed the first time. He wanted to know if I could go up and look it over once more and I told him I didn't think it was necessary and rather than go up I told him I would do the three acres regardless of cost.

"Q. Was anything said at that time about the price that was to be paid for the clearing?

"A. Yes, I said I would clear the same for $100.00 an acre.

"Q. Did you at that time refer to the conversation which you had previously had with Mr. Barnard?

"A. Yes sir.

"Q. And what was said in that connection?

"A. Wasn't anything said. I just took it that we would go ahead.

"Mr. Toole: I move that the answer be stricken, —that nothing was said. I just took it that we would go ahead.

"The Court: Denied. It may be important to the case.

"Mr. Smith: Just tell us now if you can, what if anything was said about the conversation you had previously had.

"A. Nothing more than that I would clear it at that price . . . same price as what we had talked over before." (R. 66, 67).

On cross-examination Maehl testified:

"A. He wanted to know if I would stay with that bid I made on the clearing.

"Q. And what else?

"A. And he said as soon as he found out he had the bid he would notify me and he wanted the dam

site cleared before anything else so we cleared the dam site.

"Q. I am asking you now just about the conversation that took place out on the West Fork.

"A. That was all then.

"Q. That was all he said?

"A. If I would take my bid that I give him the time before and do that clearing and I said I would stay with my bid.

"Q. And that is all that was said?

"A. Just as near as I remember.

"Q. Then did Mr. Barnard leave there at that time?

"A. Yes.

"Q. And have you now told us everything that was said between you and J. A. Barnard with respect to the clearing of the reservoir and the dam site on the West Fork dam up to the time when you started to work clearing the dam site?

"A. Well, he did say there was three acres of grubbing to be done on the dam site and wanted to know if I wanted to look at it and give him an estimate. It was hard to get away. I said I would rather do it for nothing so made the suggestion that I would do the three acres of grubbing without any extra charge.

"Q. Well, had anything been said in 1935 about the dam site? A. No sir." (R. 118-119).

"Q. And you say Mr. Barnard came out on the West Fork job—that was a road job—and said 'Maehl will you stand by the agreement you made last year?' I believe that's what you said?

"A. Yes sir.

"Q. And you said 'Yes'? A. Yes.

"Q. And that was all that was said?

"A. That's all.

"Q. Sir? A. That was all.

"Q. But Metcalf has never had anything to do with this clearing, has he, except as foreman?

"A. No.

"Q. You and Metcalf never went together to do the clearing, did you? A. No we didn't." (R. 169)

3. *Notice given to Maehl:*

After Barnard-Curtiss Company secured the state contract for the East Fork of Rock Creek job, Jim Barnard directed his brother Bob "to have Ernest Maehl go up on the damsite clearing and get it started quickly." (R. 71) Maehl was so notified. (R. 73, 119)

4. *Work begun by Maehl.*

Pursuant to notice given him Maehl started work with a crew of men and started clearing first on the damsite. (R. 76). This was August 24, 1936 (R. 121) Metcalf was employed by Maehl in this work (R. 79) but did not come to work until the 9th of October, 1936, when 5 acres outside of the damsite had been cleared. (R. 80). The work was completed January 15, 1937 (R. 85), although Maehl was sick and hospitalized for eighteen days in November preceding. (R. 79).

From this summary analysis of Maehl's testimony it is clearly apparent that there was more than sufficient evidence to go to the jury that there was a contract and that the contract was with Maehl directly and alone. Maehl frankly admitted that in the preliminary 1935 negotiations he made an offer to do the work which contemplated that Metcalf would be in with him. But this was not the situation in 1936. In that year Jim Barnard came to see *Maehl* alone and asked for what Maehl would do the work including some extra grubbing. The extra grubbing was no part of

the preliminary arrangement in 1935. The substance of the 1936 conversation was that Maehl would do the work, including the extra grubbing, at the price which had been named in the preliminary negotiations. In other words there was a reference to the 1935 negotiations for the purpose of determining the price per acre for the clearing and damsite grubbing. Metcalf had no part in this job except as a foreman.

> "Q. But Metcalf has never had anything to do with this clearing, has he, except as foreman?
> "A. No.
> "Q. You and Metcalf never went together to do the clearing, did you?
> "A. No we didn't." (R. 169).

And the jury had sufficient evidence before it to so find.

On the law problem defendant has gone to great pains to cite authorities to the effect that an action to enforce a joint right under a contract must be brought by or in the name of all surviving abligees. Assuming the validity of the argument it has no application here. There was more than sufficint evidence given by the plaintiff to show that the contract was between himself and Barnard-Curtiss Company. Indeed defendant makes no effort to apply the rule announced in *Montana-Dakota Power Co. v. Johnson,* 95 Mont. 16, 23 P. (2d) 956, and quoted by defendant. (Brief, p. 33)

> ". . . the mutual assent essential to the formation of a contract must be gathered from their outward expressions and acts, not those undisclosed."

The outward acts and expressions of Jim Barnard in

1936, coupled with the preliminary negotiation in 1935, were related by the plaintiff. Nowhere therein was there any suggetion or act to indicate a purpose on the part of Barnard-Curtiss Company to have Metcalf a party to contract. Maehl was interviewed and Maehl was notified to get a crew and start work. The jury was properly allowed to determine whether there was a contract with Maehl alone.

We do not contest the rule that "an offer can be accepted only by an offeree" (Brief, p. 35) or the rule that if an individual accepts an offer meant for another or if he falsely represents himself to be the offeree, the contract is void. (Brief, p. 39). But there was ample and sufficient evidence for the jury to find an oral contract between Maehl and Barnard-Curtiss Company. Defendant made no effort to show that it made a contract with *Maehl and Metcalf*. Defendant by its answer generally denied the contract. (R. 21); J. A. Barnard, actual managing officer of defendant (R. 188) denied the making of the contract (R. 197); and Metcalf himself testified that Barnard-Curtiss Company denied his claim (R. 292). We have then the anomoly of the defendant urging that it had made no contract, neither with Maehl or Metcalf, and at the same time urging that Maehl should suffer an adverse directed verdict because the contract was between himself and Metcalf and Barnard-Curtiss Company. At least defendant has tried to torture Maehl's testimony to show he was only one of two joint obligees. De-

fendant does not, and dares not, go to the extent of saying Maehl falsely represented himself to be the sole obligee. Defendant satisfies itself by denying all obligation to anyone. Surely the jury was properly allowed to determine from "the outward expressions and acts" whether there was a contract between plaintiff and defendant.

In preliminary argument defendant urged there were two or three "indisputable items" of evidence inconsistent with the existence of a contract (Brief, 16). The first is Exhibit 2 (improperly described as Exhibit 1 in defendant's Brief, page 16) an assignment slip given to Maehl by the W. P. A. (R. 130-131). R. W. Barnard explained this by saying:

> "Well it is a National Re-employment slip; every man had to have a slip and the number that he worked on the job." (R. 257)

And Maehl further explained:

> "Q. Do you know, Mr. Maehl, what, if anything, the purpose was in paying you 85 cents an hour during the hours that you worked on the job?
>
> "Mr. Toole: That is objected to. The fact speaks for itself. It would call for a conclusion.
>
> "Mr. Smith: Well, the counsel went into that matter.
>
> "The Court: Overruled.
>
> "Mr. Toole: Note the exception.
>
> "A. I don't know any more than that they had to carry me on the payroll. That's all I know about it.
>
> "Q. Did you ever have any conversation with Mr. Barnard about being carried on the payroll?
>
> "A. They said they had to carry me on the payroll.

"Q. And is that all you know about that?
"A. That's all I know about that." (R. 148-149)

Even more significant is the stipulation made by defendant's counsel that from January 18th until March 15, 1936, Maehl was carried on the payroll. (R. 267). This was during the period when Maehl was working under the written contract for clearing 50 acres. Defendant professes no surprise at Maehl's being carried on the payroll under the 50 acres-written-contract. Defendant can show no inconsistency with the oral contract in Exhibit 2 when there is in fact consistency with the subsequent practice under a written contract. The same is true of defendant's second item of Maehl's being carried upon the payroll at 85 cents per hour upon the basis of a reclassification slip signed by R. W. Barnard after Maehl had protested. According to stipulation between counsel it was agreed that Maehl was carried at such rate on the payroll during the time of the 50-acre written contract. (R. 267). And as to defendant's third item, Maehl carried his own time in his time in accordance with this practice.

B. Defendant's argument as to plaintiff's second cause of action needs little more attention than the scanty discussion given by defendant. This was an alleged oral contract for the grubbing of a "borrow pit" of 20 acres at a price of $65.00 per acre. (R. 5-6), there being a further allegation that the work was done and was "reasonably worth said sum" of $1,300.00. Plaintiff testified that there was no price set for the

work. (R. 87). The trial court thought there was no variance.

> "The Court: The agreement was that they were to pay a reasonable price for the work done.
>
> "Mr. Toole: —not consistent with the pleading.
>
> "The Court: Well, I think there is no material variance here. I don't suppose you are really startled or surprised at this turn.
>
> "Mr. Toole: I am always startled. Objected to upon the ground the witness has not shown himself qualified and competent.
>
> "The Court: He has been grubbing all his life. Objection overruled.
>
> "Mr. Smith: Will you answer the question?
>
> "A. $65.00 an acre, I think is a very reasonable price." (R. 88).

The allegation of the "reasonable worth" of the work done would seem to be sufficient to prevent the evidence from being materially at variance with the complaint. But even if this allegation is not sufficient to raise the alternative issue of quantum meriut, the real effect of the ruling of the court was to allow the issue to go to the jury and the failure to amend did "not affect the result of the trial of these issues." The provisions as to amendments is set forth in Rule 15 (b) as follows:

> "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time even after judgment; *but failure so to amend does not affect the result of the trial of these issues.*

> If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merts. The court may grant a continuance to enable the objecting party to meet such evidence." (Italics supplied.)

It should be noted that defendant, the objecting party, failed to satisfy the court that defendant would be prejudiced. The mere statement, "I am always startled", was purely personal repartee.

Defendant baldly states that everything urged as to the clearing contract applies to the alleged contract for grubbing the "borrow pit". (Brief, p. 51). This is an obvious overstatement. There is no evidence of Metcalf making any separate claim for this grubbing, nor of Maehl or Metcalf being together in anyway upon this job. The fact of Maehl being upon the payroll has already been explained.

C. Defendant summarily discusses plaintiff's sixth cause of action. (Brief, p. 52). We shall do likewise. The record shows:

> "Mr. Smith: Did you, —this is with respect to the sixth cause of action,—did you perform some services, Mr. Maehl, in building camp on the job at the East Fork?
>
> "A. Yes sir.
>
> "Q. At whose request did you perform those services?
>
> "A. Jim Barnard's.

"Q. And was anything said as to the rate at which you were to be paid?

"A. No, there wasn't.

"Q. What is the going rate, —what was the going rate in Granite County at that time for foremen of camp building crews?

"A. $1.20 an hour." (R. 108).

Instead of getting $1.20 per hour Maehl received only 85 cents per hour, (R. 109) for 423 hours. (R. 108). Defendant's only argument is that Maehl was working under a W. P. A. assignmentship as foreman. This we have already shown was clearly insufficient to negative a separate agreement, contract or claim in quantum meriut.

In concluding this phase of the argument defendant has said:

"That even if such a contract had been made there is not sufficient proof of performance thereof to justify the trial court in submitting the cause to a jury." (Brief, p. 52).

Apparently defendant restricts this conclusion to plaintiff's first cause of action. (Brief, pp. 2-3). Nowhere has defendant urged non-performance. Nowhere has defendant sought to point out a failure to prove performance. In fact, performance was clearly shown from Maehl's testimony:

"Q. Mr. Metcalf kept the time. At the time the 118 acres was cleared was it cleared in the ordinary and usual manner of clearing land?

"A. Yes sir.

"Q. Was any objection ever made to you by anyone that the dam site was not properly cleared?

"Mr. Toole: That's immaterial. I move that the answer to the question just before it be stricken.

"The Court: Overruled. Motion to strike denied.
"Mr. Toole: Exception.
"A. No sir. . .
"Q. And was any objection ever made to you by anyone that the reservoir site was not properly cleared?
"Mr. Toole: Same objection.
"The Court: Overruled.
"Mr. Toole: Exception.
"A. No sir.
"Q. Were you acquainted with the work that was being done there from the time that it started until the time the water was actually turned into the dam? A. Yes sir.
"Q. Was any work ever done in clearing or grubbing this particular 118 acres other than the work done by your men? A. No sir." (R. 85-86)

We respectfully submit that the defendant's motion for a directed verdict on plaintiff's first, second and sixth causes of action was properly overruled. There was more than ample evidence thereon to submit the issues to the jury.

DEFENDANT WAS NOT ENTITLED TO A DIRECTED VERDICT ON ITS SECOND COUNTERCLAIM. (Defendant's Fifth Question)

Summary: Defendant failed to make sufficient uncontradicted proof of breach of the written contract to clear 50 acres to entitle it to a directed verdict for any sum.

The first counterclaim was dismissed by defendant during the course of the trial. (R. 243)

At the close of the evidence, defendant moved:

"Mr. Toole: Now comes the defendant and moves the court to direct a verdict, a general verdict, for

> the defendant and against the plaintiff, in the amount of $3320.09, on the ground and for the reason that the proof shows conclusively that even if all of the contracts pleaded in the complaint were made, and even if all of the services pleaded were rendered, the plaintiff owes an unpaid balance to the defendant on a general verdict—a general accounting between them—in the amount of $3320.09" (R. 355)

The denial of the motion (R. 355) constitutes the basis for the fifth question presented by defendant. (R. 375). But strangely enough in the discussion of the question the defendant has greatly broadened and expanded the question Indeed, defendant has changed the question and now relies upon an asserted error of the trial court in refusing to strike testimony as to the termination of the written contract. (R. 341-344).

With its designation of the parts of the record to be printed, defendant filed and served a statement of Points on which it "intends to rely". (R. 373-376). A part of its sixth question there set forth (R. 376) constitutes the basis of the fifth question as set out in the brief. (Brief, p. 3) and the brief further recites:

"SPECIFICATION OF ERRORS TO BE URGED.

> The appellant will rely upon all of the points set forth in its statement of points (R. 374) excepting only point No. 1.
>
> SUMMARY OF ARGUMENT
>
> It is not thought that the argument can be satisfactorily summarized but the discussion will proceed upon the assignments of errors as they appear in the statement of points relied upon, beginning with point No. 2 (R. 374) and up to and including point No. 7 (R. 376)." (Brief, p. 13)

After all of this preliminary restriction of the questions and clear announcement, the defendant with ill grace seeks to raise a new question. We ask for this reason alone that this court not consider the point.

Assuming an indulgence granted to defendant, the defendant must first show (as apparently defendant recognized belatedly) error in the admission of evidence as to the termination of the written contract to clear 50 acres. Defendant fails utterly to show error because of its failure to distinguish between *alteration or modification* and *termination* of a written contract. (We agree with defendant that state law controls under the decision in *Erie Railroad Company v. Tompkins,* 304 U. S. 64)

There was not an attempted alteration or modification of the terms of the contract but an agreement between all of the parties, supported by adequate consideration, that the contract was at an end, or terminated or rescinded. Ernest Maehl testified as to the circumstances:

> "A. Mr. Strickland come over to where I was working and he says 'we are having too big a crew, we are getting pretty well through with the clearing, we will have to lay some men off, I now have some work that should have been done.' He explained it to me that he had a lot of fellows that were supposed to be truck drivers and Caterpillar drivers that he wanted to keep, he says we would like to take this over now and finish the clearing with these men on account they wanted to hold them for other work. He says 'you ain't making any money over wages anyway.' I says 'that's

right', and he says he had more important work for me to do,—

"Mr. Toole: Will you excuse me, Mr. Maehl. I move that the entire answer—

"The Court: Let the witness finish.

"A. (continued) He said he would like,—that they had other work they didn't have anybody to qualify for it and wanted me to do it and I says 'all right, if you pay us for the tools or return the tools to me and you can take the job over in the morning', which he did. That is all that was said at the time." (R. 341)

"Q. (read by reporter) Now with reference to that conversation, Mr. Maehl, was anything further said at that time between you and Mr. Strickland which you did not tell us about last Tuesday?

"A. He said that the contract was—that we would call it square if I would handle that part of the clearing that was left so as to make a kind of a line—straighten up a kind of a line— it would terminate the contract." (R. 344)

There was here then a clear oral agreement to terminate or end the contract, defendant agreeing to "call it square" and Maehl agreeing to leave his tools, subject to payment or return. There was clearly no alteration or modification but rather an agreement between the parties to terminate or rescind the contract. No substituted method or amount of clearing was assumed by Metcalf. There was no attempt to make a new contract to complete the clearing. The clearing contract was at an end.

The Montana statute, section 7569, Revised Codes of Montana of 1935, providing that a written contract "may be *altered* by a contract in writing or by an

executed oral agreement", has no application to the present situation. Likewise the cases cited by defendant are not in point. A contract may be "extinguished by its rescission." R. C. M. 1935, section 7564. And "a party to a contract may rescind the same . . . by consent of all the other parties." R. C. M. 1935, section 7565. In *Kester v. Nelson,* 92 Mont. 69, 73, 10 P. (2d) 379, the court stated:

> "The right of the parties to an executory contract to terminate it by mutual consent exists independently of any agreement permitting them so to do; and it is immaterial whether such termination be characterized an abandonment, mutual rescission, modification, or waiver. The effect is the same, to discharge the parties from obligations previously assumed. (Ogg v. Herman, 71 Mont. 10, 227 Pac. 476).
>
> " 'Persons competent to contract can as validly agree to rescind a contract already made as they could agree to make it originally. However, as a contract is made by the joint will of two parties, it can be rescinded only by the joint will of the two parties. It is obvious that one of the parties can no more rescind the contract, without the other's express or implied assent, than he alone can make it. But if the parties agree to rescind the contract, and each one gives up the provisions for his benefit, the mutual assent is complete, and the parties are then competent to make any new contract that may suit them.' (6 R. C. L., sec. 304, p. 922.) 'Again, a contract need not be rescinded by an express agreement to that effect. If the parties to a contract make a new and independent agreement concerning the same matter, and the terms of the latter are so inconsistent with those of the former that they cannot stand together, the

latter may be construed to discharge the former.' (Id., sec. 307, p. 923)

"There can be no question but what a contract may be mutually abandoned or modified by the parties at any stage of performance, and each of the parties released from further obligation on account thereof; that it may be accomplished by parol, and the fact of its having been done established by evidence of the acts and declarations of the parties. (Tompkins v. Davidow, 27 Cal. App. 327, 149 Pac. 788; 6 Cal. Jur., p. 382.)"

Admittedly the question there involved was the termination of an oral contract. The plaintiff, asserting a breach, relied exclusively upon R. C. M. 1935, section 7568, which provides:

"A contract not in writing may be altered in any respect by consent of the parties in writing, without a new consideration, and is extinguished thereby to the extent of the new alteration."

Preliminary to the above quoted remarks, the court replied:

"But he overlooks other provisions of our Codes permitting the rescission of a contract by consent of the parties. (Id., secs. 7563, 7565, 7567.) It is expressively provided by section 7565 that a contract may be rescinded by consent of the parties, and recognition thereof is given by sections 7563 and 7567."

Thus the court clearly distinguished between alteration and rescission. And its discussion of the power to terminate demonstrates that the restrictions upon *altering* written or oral contracts, as set forth in R. C. M. 1935, sections 7569 and 7568, has no application to a mutual termination or rescission of contract.

Defendant briefly urges error that Strickland was

not shown to have authority from defendant to deal with Maehl. (Brief, p. 59). In fact defendant's argument totals 12 words, makes no references to the record, cites no authorities, and contents itself with a bald assertion. Indeed, defendant's brief presents no argument and the alleged error is thereby waived, (Rules U. S. C. C. A. 9, Rule 24, 2; *McCarthy v. Ruddock,* (C. C. A. 9) 43 F. (2d) 976), and this Court is at liberty to disregard it (*Forno v. Coyle* (C. C. A. 9) 75 F. (2d) 692, 695). Assuming that the Court desires to consider the question, the record references plentifully show that Strictland was the superintendent in charge for the Barnard-Curtiss Company. (R. 264, 267, 268, 273, 340.) As such, he had the power to enter into the agreement. The Montana court has so declared in *Oscarson v. Grain Growers Ass'n., Inc.*, 84 Mont. 521, 537, 277 Pac. 14:

> " 'No principle of law is more clearly settled than that an agent to whom is intrusted by a corporation the management of its local affairs, whether such agent be designated as president, general manager, or superintendent, may bind his principal by contracts which are necessary, proper, or usual to be made in the ordinary prosecution of its business (citing cases.) The fact that he occupies, by the consent of the board of directors, the position of such an agent, implies, without further proof, the authority to do anything which the corporation itself may do, so long as the act done pertains to the ordinary business of the company. (Citing cases.)' (Trent v. Sherlock, 24 Mont. 255, 61 Pac. 650; Mayger v. St. Louis M. & M. Co., 68 Mont. 492, 219 Pac. 1102)."

DEFENDANT'S MOTION FOR REFERENCE WAS PROPERLY DENIED. (Defendant's Question 6.)

Summary: Under Rule 53(b) a reference was properly denied, the trial court having broad discretion with respect thereto.

Defendant quotes (Brief, p. 60) and relies upon Rule 53(b), of the Rules of Civil Procedure, to support its motion for reference, the defendant clearly recognizing that the action (including its counterclaims for breaches of contract) was at law and not in equity. Defendant does not urge an abuse of discretion by the trial court and clearly under the wording of Rule 53(b) and the decisions thereunder, the granting of reference lies within the court's discretion.

> *Coyner v. United States* (C. C. A. 7), 103 F. (2d) 629, 635.
>
> "We believe that whether the aid of an auditor shall be sought in law cases is ordinarily within the discretion of the trial judge. We are not in position on this appeal to question the discretion of the trial court in referring this case to the auditor. We do believe it is far better practice, except where stress of work or other good cause is shown, for the court to try cases where the determination of the issues is dependent upon the credibility of the witnesses. In this connection, it is pertinent to note Rule 53 of the Rules of Civil Procedure for the District Court of the United States, 28 U. S. C. A. following section 723c, adopted by the Supreme Court of the United States in 1938 and effective at a date subsequent to the reference in the instant case. Rule 53 provides inter alia that 'a reference to a master (includes a referee, an auditor, and an

> examiner) shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated . . .' "

Defendant makes one further unwarranted assertion that "no jury could pass upon the nine claims involved with any degree of intelligence." (Brief, p. 61). Defendant under-estimates the intelligence of jurors, completely forgets the right of trial by jury and overlooks the provisions of Rule 53e (3):

> "In an action to be tried by a jury the master shall not be directed to report the evidence. His findings upon the issues submitted to him are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report."

In other words a master's report could have been introduced as evidence but plaintiff could thereupon have introduced full and complete testimony in contradiction. The factor of possible duplication and delay was also present to influence the discretion of the court.

CONCLUSION

We respectfully submit that the defendant has shown no error and that an affirmance should be ordered.

Respectfully submitted.

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Attorneys for Plaintiff-Appellee.

Service of the foregoing Brief acknowledged this

..... day of ....., 1940.

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Attorneys for Defendant-Appellant.